2010 WL 4256984 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Arizona.
Pima County

Kathleen HAVENS, Personal Representative of the Estate of Irma Amanda Smith, on behalf of the Estate of Irma Smith, deceased; and Kathleen Havens, individually and on behalf of Irma Amanda Smith's statutory beneficiaries pursuant to A.R.S. section 12-612(A), Plaintiffs,

v.

DEVON GABLES HEALTH CARE CENTER, INC., an Arizona corporation, dba Devon Gables Health Care Center; Devon Gables Lodge and Apartments L.L.P., an Arizona limited liability partnership; Devon Gables Nursing Home L.L.P., an Arizona limited liability partnership; Priscilla Buffalo, Administrator and John Does 1-200, Defendants.

No. C 20084705.
February 5, 2010.

**Defendants' Motion for Partial Summary Judgment on the Issue of Punitive Damages**

Law Offices, Broening Oberg Woods & Wilson, Professional Corporation, Post Office Box 20527, Phoenix, Arizona 85036, (602) 271-7700, Michael J. Ryan (017467), Diana Day Rasner (023174), Attorneys for Defendants.

Assigned to the Honorable Stephen Villarreal.

Defendants respectfully submit their motion for summary judgment on the issue of punitive damages. Defendants are entitled to judgment as a matter of law, as Plaintiff cannot meet the necessary evidentiary standard for the issue to be submitted to the jury.

***MEMORANDUM OF POINTS AND AUTHORITIES***

I. *INTRODUCTION*

This case is one for wrongful death based on alleged violation of the Arizona Adult Protective Services Act (“APSA”) and medical malpractice. Simply put, the case is based on a theory of neglect under APSA and medical negligence. Under Arizona law, Plaintiff does not have the necessary clear and convincing evidence to allow the issue of punitive damages to be submitted to the jury. Partial summary judgment is therefore required.

**II. *FACTUAL BACKGROUND***

Irma Smith was a 98 year old diabetic women when she was admitted to Devon Gables Health Care Center with a non-healing pressure sore on her left heel, and a pressure sore on her sacral area. (DSSOF ¶1.) Ms. Smith had a prior history of sacral pressure sores. (DSSOF ¶2.) On December 12, 2001, she developed a Stage II pressure sore on her sacrum. (DSSOF ¶3 JIMD0377). On December 15, 2004, Ms. Smith again developed a Stage II pressure sore on her sacrum. (DSSOF ¶4 JIMD0246.) As a result, Ms. Smith received skilled home nursing care for a period of two months to assist in the healing of the wound. (DSSOF ¶5 JIMD0237.) On April 17, 2006, Plaintiff Kathleen Havens, Ms. Smith's daughter, wrote a letter to Dr. Jonathan Insel, Ms. Smith's primary care physician, stating that Ms. Smith had scoliosis, could no longer walk, and sat at a very funny angle, basically on her lower back. (DSSOF ¶6 JIMD0214.)

In February, 2006, Ms. Smith developed a pressure sore on her left heel. (DSSOF ¶ 7 EDH0022-24.) This did not heal, and therefore, on April 28, 2006, Ms. Smith received a home health assessment by a nurse at Dependable Home Health, and was noted to have a Stage II pressure sore on the left heel. (DSSOF ¶8 DHHI0093-94.) Ms. Smith continued to receive home health nursing for this pressure sore on the left heel, but because the wound would not heal and there was a distinct odor emanating from the wound, Dr. Insel admitted her to El Dorado Hospital on May 23, 2006. (DSSOF ¶9 EDH0022.) A culture was taken, and showed staphylococcus aureus resistant to ampicillin. (DSSOF ¶10 EDH0121-122) In addition, there was a Stage I pressure sore noted on admission to the sacrum. (DSSOF ¶ 11 EDH0193.) On admission, the patient's albumin level was 2.6, which is significantly low, suggesting that her nutrition and protein levels had been low. (DSSOF ¶12 EDH0131.) The sacral pressure sore continued while the patient was at El Dorado Hospital. (DSSOF ¶ 13 EDH0030-31; 316) Ms. Smith was discharged from El Dorado Hospital on June 1, 2006, and transferred to Cornerstone Hospital, but the heel and sacral wounds remained. (DSSOF ¶14 EDH0014; 0019-21).

While at Cornerstone, Ms. Smith continued to have her sacral pressure sore and the pressure sore on her left heel treated. (DSSOF ¶15 CH0174.) Her blood sugars were significantly elevated (i.e. on 06/01/06, blood sugar of 359). (DSSOF ¶16 CH0175.) The sacral pressure sore was diagramed as an open wound by Cornerstone Hospital personnel. (DSSOF ¶17 CH0228.) The sacral pressure sore was staged II, and the left heel ulceration was staged IV. (DSSOF¶18 CH0229.) The foot wound tested positive for osteomyelitis, which is an infection of the bone. (DSSOF¶19 CH0066.) Dr. Samimi, the plastic surgeon caring for Ms. Smith at Cornerstone, recommended that she continue the wound VAC on the heel if discharged home. (DSSOF¶20 CH0010.) On June 20, 2006, just three days before the patient was discharged from Cornerstone, her albumin level was 2.6 and her pre-albumin level decreased from 19 to 17. There is a specific note wherein it is stated that her nutritional needs were not being met. (DSSOF¶21 CH0231.)

On June 8, 2006, Ms. Smith was classified as a Hoyer lift transfer, up from a maximum assist of two people, because of her fragility, age, and risk of skin tears. (DSSOF¶22 CH0063.) Despite this, on June 9, 2006, when physical therapy arrived, Plaintiff Ms. Havens was in the process of moving her mother to the wheelchair by herself without assistance, and as a result, Ms. Smith sustained a skin tear to her right elbow. (DSSOF¶23 CH0190.) Ms. Havens continued to interfere with the care that was being provided to her mother at Cornerstone by the doctors and healthcare providers. For example, on June 21, 2006, despite an elevated INR of 8, which is a critically high level, Plaintiff refused to allow her mother to have fresh frozen plasma (FFP). (DSSOF¶24 CH0280.)

On June 23, 2006, Ms. Smith was discharged home, and was to receive home health care and medication for the coccyx pressure sore. The discharge diagnosis included non-healing foot ulcer. (DSSOF¶25 CH0003.) On that very day, Plaintiff Ms. Havens called Dependable Home Health and resisted giving IV Vancomycin, a powerful antibiotic, as prescribed, despite having the orders reaffirmed by the ordering physician. (DSSOF¶26 DHHI 0053.)

On June 24, 2006, Nurse C. Redman-Dagiel from Dependable Home Health did an initial home health evaluation. She noted that the patient had, among many other things, an infected left foot ulcer and peripheral vascular disease; C-Difficile infection [1] ; and buttocks pressure sores. Ms. Smith was noted to be incontinent of urine. (DSSOF¶27 DHHI 0054-66.) Nurse Redman-Dagiel noted Ms. Smith's life expectancy to be six months or fewer. (DSSOF¶28 Id.) On June 29, 2006, it is documented in the Dependable Home Health chart that there were open wounds on both areas of the buttocks. (DSSOF¶29 DHHI 0051.) These continued, became bigger, and were quite painful to Ms. Smith as of July 6, 2006, only three days before the patient was admitted to Devon Gables Health Care Center. (DSSOF¶30 DHHI 0047.)

On July 9, 2006, Ms. Smith was admitted to Devon Gables for the first time. She was noted to have a pressure sore on her left heel with the wound VAC applied, skin tears and bruising to both arms, skin tears on both legs, and a dressing called Duoderm on the buttocks, according Plaintiff Ms. Havens. (DSSOF¶31 DG 0112.) The wound team was ordered to evaluate the sacral wound and develop a wound care plan. This was done, and orders were given by Nurse Practitioner Orenduff. (DSSOF ¶32 DG 0039) The wound VAC was supposed to remain in place on the heel pressure sore, but Plaintiff Ms. Havens removed and manipulated the wound VAC to a degree that Nurse Practitioner Orenduff became very concerned that Plaintiff may be

introducing bacteria into the wound. Therefore, she ordered that the wound VAC be stopped, and that wet to dray dressings be substituted. (DSSOF ¶33 DG 0033.) Moreover, Plaintiff Ms. Havens maintained strict control over her mother's diet to the extent that eventually, by August 10, 2006, Plaintiff was giving Ms. Smith for both breakfast and lunch 1 cereal box, a handful of grapes, and a small dish of cucumbers. These changes in the patient's diet led to her losing 7 pounds in the month she was at Devon Gables. Nurse Practitioner Orenduff ordered a calorie count to be performed and Boost pudding to be ordered three times a day. (DSSOF ¶34.) It was discovered that Plaintiff Ms. Havens was only allowing her mother to receive 800 calories a day. (DSSOF ¶35 DG 0035; DG0276-277.) Moreover, Ms. Smith was afraid to turn onto her side, and resisted being turned. As a result, there was periods where there was not off-loading from Ms. Smith's sacral area. Plaintiff Ms. Havens suggested to Dr. Tatum that a Hoyer lift be used to lift her mother and take pressure of the sacral pressure sore, but Dr. Tatum was considered about the safety of such a suggestion. (DSSOF ¶36 DG 0014; DG 00139.) Unfortunately, due to the diabetes, the patient's age, the fact that she was anemic, had urinary incontinence, and was not receiving the protein calories she needed, the pressure sore on the sacrum began to progress, even though the pressure sore on the left heel improved. (DSSOF ¶37 DG0139-140.) Importantly, however, as of August 10, 2006 when Nurse Practitioner Orenduff ordered this calorie count, Ms. Smith's albumin level was 3.0, appreciably higher than it was when the patient was at El Dorado Hospital and Cornerstone a few months previously. (DSSOF ¶38 DG 0063.)

On August 24, 2006, there was a care conference that occurred wherein Nurse Practitioner Orenduff and several Devon Gables providers met with Plaintiff Ms. Havens. They instructed her that she had to cede control of her mother's diet to Devon Gables. Plaintiff ultimately agreed to do so. (DSSOF ¶39 DG 0037-38; DG 0127.) On August 27, 2006, Ms. Smith had a fall out of her wheelchair, and was sent immediately to the Tucson Medical Center ER. Ms. Smith had a contusion on her head and some skin tears. (DSSOF ¶40 DG 0054; 0122.) However, the fall did not cause her any permanent injury. (DSSOF ¶41, TMC 0197-98) Unfortunately, Ms. Smith failed to thrive, became septic, and died on September 7, 2006. (DSSOF ¶42. TMC 0090.)

In this case, Plaintiff contends that there is poor documentation by the CNAs of whether they turned Ms. Smith every two hours, and whether they offered her replacement meals when she ate 50 percent or less of her meal. Moreover, Plaintiff contends that Devon Gables personnel failed to properly assess the sacral wound initially, and failed to monitor it as they should have. As a result, Plaintiff claims the wound progressed to a Stage IV pressure sore, became infected, and caused Ms. Smith to become septic and die. Plaintiff alleges Devon Gables failed to properly care for Ms. Smith's nutritional needs, which contributed to the progression of the sacral pressure ulcer. Even if all of these things are true, Plaintiff still has not produced sufficient evidence to justify submission of the issue of punitive damages to the jury.

## II. *LAW AND ARGUMENT*

### CLEAR AND CONVINCING EVIDENCE DOES NOT REMOTELY EXIST TO JUSTIFY THE ISSUE OF PUNITIVE DAMAGES BEING SUBMITTED TO THE JURY.

#### *A. No Evidence of Evil Hand Guided By An Evil Mind.*

Plaintiff cannot sustain a claim for punitive damages. Plaintiff cannot show sufficient evidence that meets the requisite clear and convincing standard either that Defendants acted with the requisite “evil mind” or that they consciously disregarded a known risk. This Court is the gatekeeper of whether there is sufficient evidence to justify allowing the issue of punitive damages to go to the jury. Under these facts, reasonable people could not find by clear and convincing evidence that punitive damages are warranted. *See Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). Summary judgment is therefore required on this claim.

#### *B. Plaintiff's Claims Do Not Meet Arizona's Standard For Punitive Damages.*

The facts of this case do not pass the test for punitive damages under Arizona law, warranting partial summary judgment for Defendants. Action justifying award of punitive damages is “conduct involving some element of outrage similar to that usually

found in crime." Restatement (Second) of Torts § 908, comment b; *see also* W. Prosser & W. Keeton, The Law of Torts, § 2 at 9. The Arizona Supreme Court has pronounced that the standard for imposing punitive damages is "evil mind" coupled with aggravated and outrageous conduct.

> [I]t is the "evil mind" that distinguishes action justifying the imposition of punitive damages. In whatever way the requisite mental state is expressed, the conduct must also be aggravated and outrageous. It is conscious action of a reprehensible character. The key is the wrongdoer's intent to injure the plaintiff or his deliberate interference with the rights of others, consciously disregarding the unjustifiably substantial risk of significant harm to them. While the necessary "evil mind" may be inferred, it is still this "evil mind" in addition to outwardly aggravated, outrageous, malicious or fraudulent conduct which is required for punitive damages. We hold that before a jury may award punitive damages there must be evidence of an "evil mind" and aggravated and outrageous conduct.

*Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 331, 726 P.2d 675, 680 (1986), *see also Rowlings v. Apodaca*, 151 Ariz. 149, 162, 726 P.2d 565, 578 (1986) ("Evil mind" may be found where the defendant intends to injure plaintiff, or engages in conduct knowing that it creates an unjustifiable and substantial risk of harm to others.)

***C. Punitive Damages are Reserved for the Most Egregious Cases of Both Evil Mind and Reprehensible Conduct as a Matter of Public Policy.***

Punitive damages are reserved for and limited to the most egregious cases of both evil mind and reprehensible conduct. *Linthicum*, 150 Ariz. at 332, 723 P.2d at 681. Accordingly, the standard of proof is more stringent than the ordinary burden of preponderance of the evidence. Punitive damages must be proven by clear and convincing evidence in Arizona. *Id.* It is only when a plaintiff can present clear and convincing evidence that the defendant acted with the requisite "evil mind" such that he intended to injure or deliberately interfere with the rights of others, and consciously disregarded an unjustifiable, substantial risk of significant harm to others, can a plaintiff claim for punitive damages survive. *Id.*

Proof of "evil mind" requires sufficient evidence that a defendant intended to injure, or was motivated by spite or ill will, or acted in conscious disregard of a substantial risk of significant harm to others. *See Volz v. Coleman Co. Inc.*, 155 Ariz. 567, 748 P.2d 1191 (1987); *see also Ranburger v. Southern Pacific Transp. Co.*, 157 Ariz. 551(1988). It is also noteworthy that both Volz and Ranburger were decided under the lesser preponderance of evidence standard.

In *Volz*, a product liability case, the Arizona Supreme Court held that it was error to give a punitive damages instruction. The Court did not find sufficient evidence, even under a lower standard, to demonstrate, "as a matter of law, that type of 'outrageous conduct' on which an award of punitive damages must depend." 155 Ariz, at 570, 748 P.2d at 1194. The infant plaintiff was severely burned when a camp stove ejected a stream of fuel through a filter cap. Evidence showed that the defendant manufacturer had notice of the tendency of the cap to spray fuel yet never issued warnings or a recall. Even though this gross negligence triggered compensatory damages, the court held that it was insufficient *as a matter of law* to warrant punitive damages. *Id.*

In *Ranburger*, a train crash case, the Supreme Court also found punitive damages inappropriate due to defendant's lack of "evil mind". Even though the plaintiff widow presented evidence that the defendant train engineer knew the intersection at which the accident occurred was particularly dangerous yet failed to slow down, the court did not find the requisite "evil mind." *Ranburger*, 157 Ariz. at 556, 760 P.2d at 556.

It is clear, then, that cases alleging negligence or even gross negligence, without the requisite evil intent and/or outrageous conduct, *are not appropriate cases for allegations of punitive damages to reach the jury*. As the Arizona Supreme Court stated in *Volz, supra:*

The punitive damages standard in Arizona requires "something more" than gross negligence. *Rowlings*, 151 Ariz. at 161, 726 P.2d at 577. The "something more" is the evil mind, which is satisfied by evidence "that defendant's wrongful conduct was motivated by spite, actual malice, or intent to defraud" or defendant's conscious and deliberate disregard of the interest and rights of others." *Gurule v. Illinois Mut. Life and Casualty Co.*, 152 Ariz. 600, 602, 734 P.2d 85, 87 (1987).¶ To obtain punitive damages, a plaintiff must prove that "defendant's evil hand was guided by an evil mind." *Rowlings*, 151 Ariz. at 162, 726 P.2d at 578. This "evil mind" element may be shown by either 1) evil actions; 2) spiteful motives; or 3) outrageous, oppressive or intolerable conduct that creates substantial risk of tremendous harm to others. *Linthicum*, 150 Ariz. at 330, 723 P.2d at 679; *Gurule*, 152 Ariz. at 602, 734 P.2d at 87.

*It is quite clear, we think, from the evidence, that the jury could well have found negligence or even gross negligence on the part of this defendant. But negligent conduct, no matter how gross or wanton, cannot be equated with the conduct required for punitive damages. We hold, therefore, that plaintiff's evidence in this case was insufficient as a matter of law to demonstrate that type of "outrageous conduct" on which an award of punitive damages must depend.* (Citation omitted.)

*Volz, supra*, 155 Ariz. at 571, 748 P.2d at 1194 (Emphasis added.)

***D. Plaintiff's Evidence Does Not Meet Arizona's Standard for Conscious Disregard of a Known Risk.***

There is no evidence that Defendants consciously disregarded a known risk as required for an award of punitive damages. In *Ranburger* the Court discussed extensively the requisite state of mind required for a finding of conscious disregard of a known risk. The court found insufficient evidence to support a jury finding that the defendants acted in conscious disregard of a substantial risk of significant harm to others. *Id.* In doing so, the court reviewed several other cases involving similar claims.

For instance, the court noted with approval the case *of Anderson v. Chesapeake & Ohio Ry. Co.*, 147 Ill.App.3d 960, 498 N.E.2d 586 (1986). the *Anderson* court found no conscious disregard even though the defendant railroad company admittedly knew of several previous accidents at the same crossing. *Id.* at 554, 760 P.2d at 554.
The court ... believed that there had to be something more, such as evidence that "defendant knew of and refused to remedy or repair a specific dangerous condition" which had caused the previous accidents, before a jury could infer even recklessness sufficient to find willful and wanton conduct.

*Id.*

***E. The Facts Demonstrate that the Devon Gables' Employees Did Not Act With an Evil Mind.***

The facts of this case do not justify imposing punitive damages on Devon Gables. There has been no evidence submitted that the actions of Devon Gables'employees were either aggravated or outrageous. Furthermore, there is simply no evidence that employees of Devon Gables acted with an evil mind, intending to injure Ms. Smith. Even if everything Plaintiff alleges is considered true for purposes of this motion, the most that can be said is that Devon Gables' employees were negligent in their care and treatment of Ms. Smith. Neglect or negligence is insufficient as a matter of law to allow the issue of punitive damages to go to the jury.

Despite the fact that Plaintiff's counsel alleges punitive damages in every **elder abuse** case that she files, there is not a different or lower standard for punitive damages in such cases. Plaintiff's counsel and other lawyers who file **elder abuse** cases use the intimidating nature of the claim itself to argue to trial courts that punitive damage should remain and go to the jury. It is, indeed, tempting for trial courts to buy into that argument merely because of the term "**elder abuse**." However, treating **elder abuse**

cases such as this differently for purposes of ruling on punitive damages issues is error as a matter of law. Punitive damages cases are the exception, not the rule. Plaintiff's counsel would have this Court believe instead that it is the rule in this genre of case. Arizona law does not support such a conclusion.

***F. The Facts Demonstrate That No Conscious Disregard of a Known Risk Occurred.***

Similarly, there is no evidence that employees of Devon Gables consciously disregarded a known risk, and certainly not clear and convincing evidence, as required. Ms. Smith had pre-existing pressure sores when she was admitted to Devon Gables. Again, even assuming everything Plaintiff's counsel asserts is true for purposes of this motion, the most that can be said is that there was neglect or negligence. Neither negligence nor indeed gross negligence can justify the imposition of punitive damages under Arizona law.

**III. *CONCLUSION***

For the foregoing reasons, Defendants respectfully request that this Court grant their motion for partial summary judgment on the issue of punitive damages.

RESPECTFULLY SUBMITTED this 5 day of February, 2010.

BROENING OBERG WOODS & WILSON, P.C.

By <<signature>>

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ORIGINAL of the foregoing filed this 5 day of February, 2010, with:

The Clerk of Superior Court

Pima County Superior Court

COPY of the foregoing hand-delivered this 5 day of February, 2010, to:

The Honorable Stephen Villarreal

Pima County Superior Court

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Footnotes

1 Clostridium difficile is a species of Gram-positive bacteria of the genus Clostridium which causes diarrhea and other intestinal disease when competing bacteria are wiped out by antibiotics.

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